87-566 (1)



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

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No. ____

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JOSEPH LOESCH,

Petitioner,

v.

KATHRYN HECK,

Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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In Propria Persona

## QUESTIONS PRESENTED

1. Does the California Supreme Court allow a freedom of judicial discretion in family law matters that violates the standards of evidence and compelling cause required by this Court in regard to the due process and equal protection rights reserved for the parent/child relationship?

2. Whether the Due Process and Equal Protection rulings of this Court in cases such as Stanley v. Illinois require that the relationship of a child with her unwed parents, established by the parents' sharing of custody, be protected from unwarranted interference; or whether state courts can proceed as at a "first determination" of custody because the existing relationships were not established by judicial decree?

3. Are children of unwed parents classified differently from children of nuclear households, regarding their right to be brought up by both father and mother, with the fullest possible benefit of the contact, care, talents and decisionmaking abilities of both parents?

4. Under Stanley v. Illinois and Caban v. Mohammed, does an unwed father have the same parental rights as an unwed mother to continue sharing equal custody of their child? If the mother's agreement to continue shared parenting

is removed, is the father/child relationship protected under the due process and equal protection causes from unwarranted interference, or set at issue by the mother's change of heart and subject to redetermination by the state?

5. Do the due process and equal protection clauses allow state courts to construe an unwed father's requests to resume equal custody as a "campaign to limit the mother", while the mother has seized full custody of the child and asked the court to terminate the father's custody rights?

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IN THE SUPREME COURT OF THE UNITED STATES

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Joseph Loesch respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Appellate District of California, entered in this cause on March 11, 1987.

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## OPINION BELOW

The opinion of the Appellate Court for the Second District of California is unpublished and

appears in the Appendix, page A-2. That Opinion was entered on March 11, 1987. The California Supreme Court denied a timely Petition for Hearing on June 2, 1987 [Appendix-1].

## JURISDICTION

The Order on Order to Show Cause requesting restoral of the equal parental custody and control of Ingrid Kathryn Loesch by both of her parents, filed by Petitioner was entered by the California Superior Court on June 28, 1985 [Appendix-24]. The order terminated Petitioner's legal joint custody and limited his contact with the child to a physical custody of approximately one-fourth of the month.

The Court of Appeals for the Second Judicial District of California entered its Opinion on March 11, 1987, affirming the trial court's Order [Appendix-2].

The Supreme Court of California denied a timely Petition for Hearing, making final the decision of the Court of Appeals, on June 2, 1987 [Appendix-1].

Jurisdiction to review the judgment of the California Courts is conferred on this Court by Article XIV of the Fourteenth Amendment of the Constitution of the United States, and by Title 28, United States Code, Sec. 1257(3). As set forth below, the Opinion and Judgment of the California Appellate and Supreme Courts raise important questions under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Amendment XIV

"The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."

California Civil Code, Section 7002

"The mother of an unmarried minor child is entitled to its custody, services and earnings. The father of the child, if presumed to be the father under subdivision (a) of Section 7004, is equally entitled to the custody, services and earnings of the unmarried minor. If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings.

California Civil Code, Section 197

"The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy."

California Civil Code, Section 4600(a)

"Custody should be awarded in the following order of preference according to the best interests of the child, pursuant to Section 4608: To both parents jointly pursuant to Section 4600.5 or to either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex."

California Civil Code, Section 4600(b)

"There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child subject to Section 4608, where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of a minor child of the marriage."

California Civil Code Sections 4600.5(a)

"Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases, subject to the provisions of Section 4608. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court may direct that an investigation be conducted pursuant to Section 4602."

California Civil Code Sections 4600.5(b)

## STATEMENT OF THE CASE

Petitioner JOSEPH LOESCH and Respondent KATHRYN HECK are the unmarried parents of INGRID LOESCH, born October 27, 1982 [Appendix-48]. From birth, the parents shared in Ingrid's care and custody. The father provided the mother with financial support, and provided Ingrid with her own bedroom in his home as well as visiting her in the mother's home. Ingrid was eventually sleeping in her own bedroom in both parents' homes, an equal number of nights [RT 110:7-15; 130:14- 131:2].

The parties' disagreed over taking Ingrid to the doctor when ill, with the mother threatening to withhold contact with the child if the father took her to the doctor without permission [RT 52-53]. In February 1984, the parents agreed to continue the equal custody and sleeping arrangement per a new schedule suggested by the mother [Appendix-49]. An argument about doctors' advice regarding the mother's alcohol consumption while breastfeeding Ingrid resulted in the mother taking Ingrid from the father's home. The father requested they restore their parenting schedule, in letters and phone calls; the mother proposed he have less contact with the child, and then refused any contact except in her own home under supervision of her friends [RT 127:21-25].

PROCEDURAL HISTORY

The procedural history of the case reflects the father's attempts to reestablish his previous joint legal and physical custody of the child.

The father filed a Complaint and Order to Show Cause on February 24 and April 4, 1984, asking that legal and physical custody be restored per the mother's schedules of 2/5/84 [Appendix-50, 53]. In May of 1984 the mother replied to the Order to Show Cause with a Responsive Declaration asking for sole legal and physical custody of Ingrid, on grounds that the child experienced difficulty with the sleeping arrangement; her Answer to Complaint claimed a lack of knowledge of Joseph Loesch being Ingrid Loesch's father, and asked that if he were found to be the father, that the court not restore his joint custody [Appendix-57, 61].

Petitioner substituted new counsel in June, 1984 who attempted to negotiate a temporary stipulation of father-daughter contact. The mother refused any temporary schedule except to a decreased paternal custody arrangement, with the provision that it be in effect six months or more. As Ingrid was then being allowed some contact with the father, and relying on his attorney's warning that a six-month agreement of decreased custody might divert the court from the original equal custody, Petitioner chose to wait for the OSC hearing in August. Thereupon the mother completely withheld the child again.

The father made an Ex Parte request of the court to immediately restore Ingrid's contact with him,

and Temporary Restraining Orders, which the mother declared "moot," as she now had the child in her custody. The father's Ex Parte Request was denied, but an early hearing date was set. On the hearing date, the mother signed a temporary stipulation [Appendix-44] allowing the father the decreased schedule she had lately offered and withdrawn; she then objected to it being ordered by the court, and obtained a further continuance of three weeks from the court, with no provision for the child to see her father. On advice of counsel pursuant to California Civil Code Section 197, the father insisted on his right to see his daughter and picked her up from a babysitter. The mother claimed this was an "abduction," and sought an Ex Parte order terminating all of the father's custody rights, subjecting him to visitations monitored by her friends.

The Ex Parte judge who had followed the case denied the mother's request and ordered a week of shared custody and a hearing on July 3, 1984. On that date, the mother allowed the signed stipulation to be made an order of the court [Appendix-44]. The stipulation provided a temporary order for joint legal and physical custody, and psychiatric evaluation by a court-appointed psychiatrist, pending the hearing on Appellant's February, 1984 Order to Show Cause.

There followed a year of delays, necessitated by the psychiatrist's schedule, the court, and the attorneys; for that year the temporary stipulation remained in effect. The parties completed psychiatric

evaluation by Gary Chase, M.D., Senior Psychiatric Consultant to the Los Angeles County Superior Court Family Law Departments; his recommendations to the Court were filed December 3, 1984. A second recommendation was filed February 17, 1985.

## CONSTITUTIONAL ISSUES RAISED

Petitioner first raised the issue of constitutional rights in June 1984, in the Memorandum of Points and Authorities to his Ex Parte request, by citing under relevant California Civil Codes and Stanley v. Illinois, his essential constitutional right to raise his children, equal to the mother, regardless of marital status and without need of specific judicial permission. Pertinent quotations were from California Civil Code §§7002 and 197, set forth on pages 2 and 3 above, "Statutory Provisions", as well as the following:

> "With respect to the rights of a presumed father who has not obtained a judgment declaring him to be the father of a minor, the Court in People v. Johnson (1984) 151 Cal.App.3d 1021, 1025...stated:
>
> > "Thus, the Act--including section 7004--was plainly intended to establish and promote the rights of putative fathers, and to remove obstacles to the maintenance of parental relations for the benefit of 'illegitimate' children. And section 197 does not specify that only those parties who have by judicial decree achieved formal status as a parent (cf. §7006) are entitled to custody. Rather, it grants equal custodial rights to anyone 'presumed to be a father under section 7004,' thereby indicating that the substance of

> the relationship--spousal and filial, rather than prior judicial adjudication shall have precedence..." (emphasis original).
>
> ...The Court in In Re Tricia M. discussed the constitutional rights of fathers as decided in Stanley v. Illinois (1972) 405 U.S. 645 [31 L.Ed.2d 551, 92 S.Ct. 1208]:
>
> "Mr. Justice White, writing for the Court in Stanley set out some basic concepts in this area:
>
> 'The rights to conceive and to raise one's children have been deemed "essential," [citation], "basic civil rights of man," [citation], and "[r]ights far more precious ... than property rights," [citation].
>
> 'Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony ..."To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." [Citations.]' (Stanley v. Illinois, 405 U.S. 645, 651-652 [31 L.Ed.2d 551, 558-559, 92 S.Ct. 1208, 1212-1213.].)" (emphasis added)

Petitioner next raised these rights in a Memo of Points and Authorities submitted to the trial court at the beginning of the hearing on June 4, 1984. Equal parental rights were again raised in Petitioner's Request for a Statement of Decision, filed with the court on June 17, 1987. These issues were thereafter raised in Appellant's Opening Brief and all subsequent briefs to the California Courts.

JUNE 1985 HEARING

After delays of 1½ years, there was a full hearing in June 1985 in Los Angeles Superior Court by Judge Robert Fainer.

The Judge did not address protecting the original, de jure custody arrangement that was the cause of action in the Order to Show Cause. He did not require a substantial showing of cause for changing the child's established custody as required by California and U.S. case law (In Re Marriage of Carney, 24 Cal.3d 725, 157 Cal.Rptr. 383; Stanley v. Illinois). The mother made an unsubstantiated claim that the child had more illness, anger, and problems sleeping in the mother's home when she was also sleeping in the father's home, which was at odds with her statements that the father was "overly concerned" about the child's health matters, and the court psychiatrist's encouragement to gradually resume an equal sleepover schedule. Aside from the "sleeping problems" there was no good cause suggested or required by the court for the mother wanting to fully terminate the father's legal and physical custody.

Both the father and the mother alleged physical violence at the February 1984 argument and other occasions; the mother presented no claim of injury, while the father presented evidence of injury to his hand, and the judge found the mother in contempt of a court restraining order for physical behavior. The mother stated that she felt a family consisted of two persons, "mother and daughter." She denied that

the cause of action arose from the father objecting to her alcohol consumption while breastfeeding, and her objections to him seeking medical care for the child.

The father testified that the mother ignored the child's medical needs and the pediatricians' advice, and a MediCal worker testified that the mother had allowed the child's medical coverage to lapse. The judge stated that mother was "irresponsible"; in response, the mother later testified that the father was "overly concerned" about medical care.

The mother also denied hitting the child on the forehead in an incident the father had caused to be investigated by a child abuse worker, a doctor and the court psychiatrist.

There were no allegations of neglectful care by the father. The father asked that he assume full medical responsibility and insurance costs for the child, and that the court restore equal custody as per a schedule recommended by the court psychiatrist, and that the court order counseling for the mother regarding possible problems with alcohol abuse and self-control.

The recommendations of the court psychiatrist were received by the court; Petitioner attempted to present evidence regarding the events of the original cause of action, including an injury; the judge stated that he was "not interested" in events that were two years old", but allowed Petitioner's attorney to "make a record."

Ignoring the original custody at issue, the judge proceeded as if custody were being determined for the first time. He showed himself ready to make a decision before hearing the evidence in the case [RT 28:10; 32:17-19; 34:12-21; 40:18-22]; during the hearing he stated he was not interested in the circumstances of preceding the temporary stipulation, as it was "two years ago" [RT 110-112], and stated he was going to make an order other than Judge Sandoz' order (on the stipulation) [RT 124:10-15].

The judge expressed interest in making an order of counseling for the parties; Petitioner's attorney emphasized that Petitioner was in court to seek restoral of his equal custody, and would go to counseling as well. Petitioner's attorney asked the other attorney about getting the mother to agree to restored custody and counseling; the judge stated that he did not want the attorneys to "make a deal", but that it was "better that he make an order" and that he "would not be blocked by [the father]", that he didn't think "50-50" custody was the answer, that he preferred the parties stipulate to an order of counseling [RT 28:10-19; 34:11-26; 28:16-21]. The judge suggested that with equal custody, Petitioner's parents would in fact raise the child;" counsel informed the judge that the father worked four ten-hour days, and could personally care for the child. [RT 34:18-26; 37:27-38:14; 35:5-10].

In addition to the facts above, the Judge was given the following evidence with regard to the father

resuming joint and equal custody:

That the father is a loving and responsible parent, capable of providing a good, stable home for the child [RT:18-19; 50:14-51:9]; that Ingrid had her own bedroom in his home (and the home of his parents, where he resided at time of the hearing as a result of attorney costs [RT 128:21-130:2; 226:1-3]; that the father spends his time with Ingrid in activities geared toward a child [RT 50:14 - 51:9]; he is concerned for her physical well being and willing to assume medical costs and responsibilities [RT 51:24-52:8; 71:28-72:7]; and Ingrid has benefited from her relationship with her father [RT 50:14-51:9].

The judge found the father to have made an unreasonable "campaign in court to limit the access of the mother," and to have caused the communication problems by that campaign in court and by the father's allegation of child abuse and alcohol abuse, and his "refusal" of the judge's urgings to go to counseling. The judge found the mother in in contempt of court for one incident of violence, and ordered her to resume medical coverage, and urged her to include a substance-abuse program in her counseling. (Appendix B). The judge terminated the father's legal custody, specifically restricted him from caring for the child's medical needs except in an emergency, and reduced his original physical custody to one-fourth of the month. The Court of Appeal affirmed.

The Appellate Court also did not recognize the original custody that was at issue, and referred only to the temporary stipulation as having insufficient legal status to require a showing of changed circumstances before the child's custody could be changed.

## REASONS FOR GRANTING THE WRIT

### A. Importance of the Questions

Aside from the importance of these questions to Petitioner and his child, the question of essential and fundamental rights in the parent/child relationship has not been addressed by this Court in the area of where those rights are most commonly threatened and lost: not where there is death of a parent, improper interference by state adoption agencies, or clearly proven failures on the part of either parent to care for the child. The parent/child relationship is most at risk where one parent simply asserts that they have a parental relationship that is superior and more essential to the child than that of the other parent. And by virtue of state courts favoring court decrees rather than familial bonds, one parent can force the other into a complete redetermination of the established parent/child relationships by forcing a hearing in state courts.

The child's need and right to ongoing love and care from her father and mother, and the essential, fundamental right of a parent to care for and raise his own child, is redetermined by state officials in cases where there is no fault or failure to justify decreasing the parent/child bond. Yet in state courts, the regard for family custody relationships established by court decrees is consistently higher than the regard for relationships established by the

natural relationship of a parent and child, and their personal history of being with each other.

The increasingly lucrative divorce-law business, and the increasing numbers of children and parents deprived of their most precious possession--each other--makes the "ordinary custody decision" a crucial concern of the state. The divorce rate and the numbers of legally separated children and parents in the United States makes equal protection and due process for the parent/child relationship an issue urgently needing assistance from this court.

There is also need to encourage unwed, or divorced, fathers who wish to maintain their paternal relationship with their children. In cases such as the one at bar, there is strong evidence that a father wishing to help raise his children--a generally accepted "good" that cannot happen often enough--he runs a high risk of emotional and economic devastation, as well as punitive labels and court orders by judges who do not recognize paternity as half of a child's world. As much as women have called for recognition in the marketplace and political system, men need to be given an equal place in the family and in their children's eyes.

From an economic standpoint, this court needs to promote relationships established by parental cooperation and responsible thinking; the incredible state cost and backlog of the divorce courts, and the high state cost of maintaining the members of broken families, urges that court decrees <u>not</u> be required

before common sense can rule basic family relationships.

But most importantly, there is a terrible need for the children of divorce -- an increasing population -- to be released from the suspect classification under which they currently lose their relationship with one of their parents. The right to ongoing care and upbringing by Dad and by Mom is accorded to children of intact nuclear families. Somehow, state officials decide that the same child who loved and depended on the protection and love of her father and mother, can do well without one of them when the parents break up. The child has no voice, except in the questions the "disposable" parent cannot answer. --"Why can't I see you?"

B. Conflict Between State and U.S. Standards

The decision below conflicts with rulings of this court in Stanley v. Illinois and other cases regarding the Equal Protection and Due Process rights of the Parent/Child relationship. By asserting state court determinations as the legally recognized beginning of the Parent-Child relationship, the California courts make a suspect classifications of unwed parents and their children.

As stated above, the cause of action in this case was arbitrary interference with equal parental custody shared by the father and mother. Petitioner's case concerns the difference between the standards of this Court and the California state courts in recognizing established parent/child relationships, as exemplified by Burchard v. Garay (1986) 42 Cal.3d 531, and Stanley v. Illinois 405 U.S. 645, 651 (1972).

This Court has granted and affirmed a high legal status for parent/child custody relationships established by biological relation and the practice of parental care, whereas the California state courts reserve such legal status for child custody arranged by court decree. The state courts emphasize judicial determinations as the recognized legal point of origin of parent/child relationships outside the nuclear family setting, and feel free to redetermine custody relationships formed by parental practice as if the custody relationship were being determined for the first time. This conflicts with the standards set forth by this court. While this Court has more often

ruled on parent/child rights in regard to adoption cases rather than "best interests" custody cases, the Court has established clear principles regarding family rights standards of evidence required for the state to find parent/child relationships not in the best interests of all concerned.

This Court has recognized the rights of parents and children to have their relationship with each other as being basic, fundamental rights protected by the Fourteenth Amendment to the United States Constitution. Stanley v. Illinois, 405 U.S. 645, 651 (1972); also Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Griswold v. Connecticut, 381 U.S. 479, 500 (1965).

The Court has frequently emphasized primacy of the parent-child relationship. The rights to conceive and to raise one's children have been called "essential" and "[r]ights far more precious than property rights". Bell v. City of Milwaukee, 746 F.2d 1205 (1984); Meyer v. Nebraska, (1923) 262 U.S. 390, 399; May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843 97 L.Ed. 1221. The liberty guaranteed by the Fourteenth Amendment is found to protect the right of the individual "to marry, establish a home and bring up children". Meyer v. Nebraska, supra. A "fundamental liberty interest of natural parents in the care and management of their child" was cited in Santosky v. Kramer, 102 S.Ct. 1388.

In constitutional law a fundamental right is defined as a right so basic or essential that the state must have a compelling interest to override it and

must, even in those cases, use the least restrictive means possible to secure the compelling interest.[1] Roe v. Wade, 410 U.S. 113, 162-163 (1973); Dunn v. Blumstein, 405 U.S. 330, 342 (1972); Kramer v. Union Free School, 395 U.S. 621, 627 (1969).

And this Court has stated that the relationship between a parent and child is constitutionally protected from state intrusion. Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Roberts v. United States Jaycees 104 S.Ct. 3244 (1984) citing Meyer v. Nebraska and Pierce v. Society of Sisters 268 U.S. 510 (1925).

These cases make it clear that parents have a fundamental right to direct the upbringing of their minor children. What remains to be examined regarding this case is whether these parental rights exist only within a traditional nuclear family setting or if they are present independently of such a structure.

The Supreme Court has addressed that question in Stanley v. Illinois, supra. In Stanley, the Court

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1 The least restrictive alternative doctrine was defined in Shelton v. Tucker as follows:
[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieve. The breadth of legislative abridgement must be viewed in light of the least drastic means for achieving the same basic purpose. 364 U.S. 479, 488 (1960).

discussed an unwed father's right to custody of his children. In addressing the constitutionality of state adoption statutes which presumed to remove the children from the father when the recognized parental status of the mother was lost through her death, the court pointed out that it repeatedly has placed emphasis on "the importance of the family," and it stated that "[t]he rights to conceive and raise one's children have been deemed 'essential', 'basic civil rights of man' and 'rights far more precious. . . than property rights.'" (at 651, citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1941); Meyers v. Nebraska, 262 U.S. 390, 399 (1932)). The Court stated that

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. Stanley, at 651.

Thus, the Stanley Court recognized the right of the biological father, absent a showing of unfitness, to continue to raise his children even though the traditional bond of marriage was absent in this family setting. (Id. at 658-59).

In the case at bar, there was no evidence of unfitness on the part of the father to prevent him continuing to raise his daughter in an equal custody

arrangement. As developed above in the Statement of Case, the mother alleged that the child was more frequently ill from sleeping in both parents' homes. If that allegation were true--and it conflicts with the mother saying that the father was "overly concerned" about health matters, and the court psychiatric expert encouraging more of the shared sleeping arrangement--the "least restrictive alternative" would be to alter the sleeping arrangement: not to terminate the father's custody rights, or attempt to deny that he was the father. And the reasons given by the court for interfering with the father's custody--that he was unreasonable and inflexible and had a court campaign to limit the mother, thereby making her the more reasonable parent (more in the best interests of the child)--is completely at odds with the father asking that equal custody be restored, and the mother seizing the child, denying paternity, asking for full custody and declaring that to her a family consists of "two people -- mother and daughter."

The Stanley standard of protection for an established parent/child relationship was unjustifiably denied this unwed father.

The importance of a biological relationship as a basis for extending constitutional protection was made clearer in Moore v. City of E. Cleveland, 431 U.S. 494, 499-500 (1977), wherein an extended family relationship was protected from discrimination favoring nuclear families. Stanley and Moore show that family relationships linked biologically and functionally

similar to that of the nuclear family occupy a place in the American tradition similar to that of the nuclear family, and consequently enjoy the same constitutional protections from state or other interference.

The Court went further in defining constitutional protection of family relationships in Smith v. Organization of Foster Families For Equality ("Smith") 431 U.S. 816, 842-44 (1977) and Quilloin v. Walcott, 434 U.S. 246, 255 (1978). The Smith Court noted that the usual understanding of family implies biological relationships. . . ." and that the importance of the family stems from the emotional attachments that are developed there (Id. 843, 844) (emphasis added). The actual importance of the emotional ties in identifying a constitutionally protected relationship was strongly stated in Quilloin v. Walcott.

Quilloin, like Stanley, involved an unwed father's parental rights. The unwed father's rights were not enforced by this Court, not because he was outside a nuclear family setting, but because he was outside the determining standard for those parental rights: though he had the biological connection, he had not exercised custody and responsibility, and there was not a strong emotional bond between the parent and child.

This contrasts with William Stanley and the petitioner herein, who both developed significant ties and involvement as parents before the lower courts chose to redetermine their parental status. This

unwed father not only exercised custody and responsibility, with the likelihood of an emotional bond with his daughter, but was specifically found by the court's psychiatric expert to be "quite warm, loving and devoted to Ingrid" and "a safe, reassuring father" who "certainly would provide responsibly and well for her" [November 5 Report of Dr. Chase, pages 8-10]. Dr. Chase recommended restoring the father's custody in increments to three days per week.

It seems clear from those elements isolated by the Court as necessary for constitutional protection of the parent/child relationship that the relationship between unwed parents and their child is entitled to such protection. The Court recognizes what this unwed father possessed: the necessary biological relationship stressed by the Stanley-Moore-Smith line of cases, the established emotional ties singled out as controlling by the Court in Smith and Quilloin, contribution of substantial support and the exercise of custody and care of the child as stressed by the Court in Quilloin and Stanley.

The California Supreme Court, which at one time recognized the Stanley principles in custody disputes by stressing, in In Re Marriage of Carney, the importance of ongoing and established family relationships as they developed through custody agreements of the parents, has lately altered that standard in Burchard v. Garay (1986) 42 Cal.3d 531.

Under Burchard v. Garay (which was cited by the Appellate Court herein in support of the lower court's freedom to change custody), state courts do not need to find a substantial change of circumstances to justify changing a child's established relations with her parents where custody is by parental agreement. Rather, courts can proceed as if these relationships were being formed for the first time (by the court), since substantial legal status is reserved for custody determinations by judicial decree. The mere" fact that the child is strongly bonded to a parent and has her sense of security in expecting ongoing care and closeness with her parent does not have the weight of a judicially determined relationship.

Though the Burchard court recognized Ana Burchard's de jure custody, it altered the "change of circumstances rule" established in In Re Marriage of Carney, supra, stating that the rule actually only applies "once it has been established that a particular custody arrangement is in the best interests of the child...whenever custody has been established by judicial decree" [Id. at 535].

> "The change of circumstances standard is based on principles of res judicata." [citations] "The Rule established in a majority of jurisdictions, which we here endorse, applies that standard whenever custody has been established by judicial decree. A minority of states limit the standard further, applying it only when custody was determined through an adversarial hearing. No state, so far as we have ascertained, applies the changed-

> circumstance standard when there has been no prior judicial determination of custody." Burchard, at 535. (emphasis added)

Justice Mosk found that the majority distinction to overly limit the changed circumstances requirement, and felt it constituted "denial of protection to an entire class of children solely because custody was not originally established by judicial decree." [Id. at 546, 547] Along with Justice Lucas, he agreed with the Burchard majority's decision--based on the Carney rule, with the view that the majority's interpretation amounted to "a tacit overruling of ...Carney." [Id. at 546]

> "In Carney we expressly held that the rule applied regardless of how custody was originally decided upon... We imposed on the noncustodial mother the burden of proving that a substantial change in circumstances had occurred... and we concluded that she had not carried her burden [Carney at 740]. It is difficult for me to conceive how we could have established the point more clearly." [Id. at 547] (emphasis added)

Like Ana Burchard, Ingrid's father had lawfully acquired (joint) custody by practicing, from Ingrid's birth, the equal custody rights both parents have under California Civil Code Sections 197 and 7002. Unlike the Burchard waiving of the "rule", the lower courts herein did not recognize the importance of an established relationship, but emphasize the status of judicial decrees, denying protection to the parent/child relationship because Ingrid belongs to the

classification of children mentioned by Justice Mosk. And the Appellate Court herein did refer to the changed circumstances rule; not in regard to Ingrid's family bonds, but in regard to the temporary custody stipulation of these proceedings.

**C. Due Process Rights That Were Violated**

Due Process Rights of Joseph and Ingrid Loesch were violated by the state courts as follows:

1. The lower courts refused to recognize the estabished parent/child relationship that existed as the cause of action.

In the case at bar, Petitioner sought state protection of his established equal custody relationship with his daughter when the mother arbitrarily seized full custody of the child. The lower courts never addressed whether the Petitioner had a defendable right, in his established parenting of Ingrid, for which he could seek court protection. They referred only to the temporary custody stipulation as being modified.

2. The lower courts failed to address the evidence presented in the case.

As stated above, the lower courts did not have evidence of "compelling cause" for terminating or reducing the father's custody. They also ignored the weight of evidence on a simple evidentiary level.

Where all court documents showed a campaign by the mother to limit the access of the father, the court stated the opposite, completely controverted conclusion. The judge repeatedly ignored the fact that the father had a four-day work week and could personally care for Ingrid three days; he maintained that the paternal grandparents would raise the child in an equal custody arrangement. Where a MediCal worker and the mother and the judge made statements that showed the mother irresponsible regarding medical care, and the father expressed willingness to assume the responsibility, the court found the mother (in the text of its order) to be the more responsible parent, and restricted the father from providing medical attention; the Court of Appeal justified this on the basis that yearly checkups were sufficient to compensate for possible neglect of medical care. --For a two-year-old child. The father was accused of causing stress by his concerns about child abuse, despite the fact that a child abuse worker, an examining doctor, and the court psychiatrist also found cause for concern. Finally, the recommendation of the court's top psychiatric panel member that the father's custody be increased back to nearly equal custody, was completely ignored by the trial court, and explained as simply "not binding" by the Appellate Court.

A judges' refusal to consider evidence and psychologists' reports denies due process right to

"meaningful hearing." Armstrong v. Mango, 380 U.S. 545, 552; 85 S.Ct.1187 (1965). One of the essential elements of due process is the right to submit --and to have considered--evidence supporting a litigant's cause, particularly evidence involving a child's well being and custody. Application of Gault, 87 S.Ct. 1428, 1435. The father had a right to benefit from evidence submitted on his own behalf: the uncontradicted, unimpeached statements of the Los Angeles Superior Court's senior psychiatric panel member, as well as the clarity of the other pleadings and testimony showing the father's fitness to share custody and to care for Ingrid.

3. The Court punished the father for seeking due process, applying heavy handed justice with facially neutral terminology.

The court's reversal of the "campaign to limit" the other parent, and the assignment of "unreasonableness" and "inflexibility" to the father, as a reason for terminating/decreasing his custody, provides facially neutral explanations of the court's order. The record conflicts too strongly for this to be appropriate.

Mere recitation of a proper state purpose is not sufficient to establish a compelling state interest which can justify such state action Trimble v. Gordon, supra.

4. The Judge applied his personal beliefs, rather than the correct constitutional principles and standards of evidence, to the cause of action.

As stated above, the judge herein announced himself opposed to "50-50" custody well in advance of hearing the case; he ended his hearing with a statement that "I am one of the old fashioned judges who has opposed joint custody..."

The record shows the judge would not accept the fact that the Petitioner would personally raise the child on his days off work; it also shows that he felt that a father who would want to become closely involved in a child's life could not be "normal".

> THE COURT: Do you believe you would have a healthy, normal life if you adjusted your entire life to -- in such a way to convince the court that you should have custody of the minor child, would you have a normal life if that is all you are going to do is spend it with your child?
>
> THE WITNESS: I am still going to work a job. Yes, I will have a normal life.
>
> THE COURT: You mean to suggest to me you should be given custody of the child while you are working, do you?
>
> THE WITNESS: Yes.
>
> ...THE COURT: What you are really telling me is while you are working you want your parents to start all over again with a two or three year old child. Is that what you are telling me?
>
> THE WITNESS: No. Really--
>
> THE COURT: Sounds like it. [RT 73-74]

5. The Judge applied unequal standards to the custody requests of the mother and the father, as developed below.

6. The State's termination of this father's legal custody and reduction of his physical custody violated the standards of this court, in that it interfered with a fundamental parent/child relationship with no substantial evidence of compelling cause to do so.

## D. The State Courts Make A Suspect Classification Of Unwed Fathers And Their Children

### 1. Unwed Fathers

In Stanley v. Illinois, the unwed father fully participated in the upbringing of his children without interference by the state so long as the mother of the children was alive and consenting to his paternal role. Upon her death, the father lost his parental rights under Illinois law.

This Court found the position that unwed fathers "can have protected their parental status via marriage or adoption of the children" so as to promote "legitimacy", to be a state purpose insufficient to outweigh the father's personal interest in continuing to raise his own children.

The Court found that conditioning Stanley's paternal rights on the presence or absence of the

unwed mother's parental status and her "protective" consent to the father's paternal role, was a denial of the essential, fundamental nature of the unwed father's rights. His parental rights could not be diminished (he became a stranger, under Illinois law, to his children) by sudden absence of maternal approval.

In Stanley, the state automatically revoked the father's parenting upon death of the mother, and made his children wards of the state.

While this case did not involve death of the mother, or adoption agencies, the parenting of this unwed father herein was set at issue and subjected to a redetermination when the "protection" afforded by maternal agreement ceased.

As in Stanley, this father's parental role should have been recognized as substantial and equal to the maternal role, regardless of the presence or absence of maternal consent. The parent child relationship had become established and had all the aspects of a substantial family bond.

In Stanley, Caban v. Mohammed 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979) and other cases, this Court has ruled that parental rights exist for equally for men and women under the Fourteenth Amendment. In Stanley v. Illinois, the U.S. Supreme Court found that a child has an equal right to be raised by her father and her mother, and if custody is awarded to one parent it must be to the better parent. See also Lehr v. Robertson, 103 S.Ct.2985

(1983), and Caban v. Mohammed, . The California legislature, if not the California courts, has declared that the parent-child relationship extends equally to every child and every parent, and exists regardless of the marital status of the child's parents (Civil Code §7002); fathers and mothers are equally entitled to the custody of their children (Civil Code §197). California Code of Civil Procedure §4600(b) also recognizes the inherent equality of parents, by favoring whichever parent will allow frequent access to the other parent.

As shown in this case, state courts feel a discretionary freedom to ignore the legislative emphasis on the sharing parent, and to apply different standards of evidence to the custody requests of mothers and fathers. The idea that the father unreasonably limits the mother by asking for equal custody while the mother withholds the child and causes the father to seek court relief; and that upon finally getting a hearing, the courts "are not interested in what happened two years ago" and applies a blind eye to the "campaign" of the mother asking for full custody, indicates unique thinking where the rights of mothers and fathers are concerned. She is "the more flexible, reasonable" parent and the court grants her most of the full custody she requested. --effectively certifying the mother's right to seize custody of the child.

The United States Constitution guarantees not only the enforcement of fair and reasonable laws, but

also the fair and reasonable enforcement of laws. Yick Wo v. Hopkins (1866) 118 U.S. 356, 373-374, 6 S.Ct. 1064, 30 L.Ed. 220.

Where a classification involves gender, it will not withstand a constitutional challenge unless it serves important governmental objectives. Craig v. Boren (1976) 429 U.S.190, 197, 97 S.Ct 45, 50 L.Ed. 2d 397. Judge Fainer's presumption of proper gender roles and stereotypes was shown throughout the hearing, especially in his question about a father having a "healthy, normal life if you adjusted your entire life to--in such a way to convince the court that you should have custody of the minor child, would you have a normal life if that is all you are going to do is spend it with your child?" [RT 73:18-22].

2. **Children**

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Amendment XIV.

California law extends the parent-child relationship equally to every child and every parent regardless of the marital status of the child's parents (Cal. Civil Code §§ 197, 7002). However, the California courts enjoy a freedom of discretion in family law matters that allows them to override statutory law and the result is, as Justice Mosk said in Burchard v. Garay, supra, "to deny protection to an entire class of children" because the child's custody was not established by judicial decree, but by the parents.

Addressing the majority's distinction of the "change of circumstances rule", Justice Mosk wrote that

> "...the limited application of the changed circumstances rule that the majority adopt is in conflict with the primary purpose of the rule. The child whose custody was established by means other than judicial decree has the same need for and right to stability and continuity --and accordingly the same entitlement to the protection the rule is intended to provide--as the child whose custody was originally established by judicial decree." [at 548] (emphasis added)

The federal cases mentioned above that establish equal protection of parent/child relationships are incorporated herein by reference.

The state's action of denying Ingrid Loesch the right to continue her established relationships with both of her parents makes her a member of a "suspect classification". She is a member of that classification not as a matter of gender, but by her involuntary status as a child of unwed parents. In that light this Court should apply strict scrutiny to the state's action in assessing whether the suspect class of children of unwed parents are being denied by state action the equal protection of law, compared to the class of children of parents who are married. Ingrid's emotional bond to both parents was subordinated to the state redefining the "best interests" which all of related decisions of this Court find to be the maintaining of family inter-relationships

--the emotional bonding, caring and instruction of the parent/child relationship.

The court's specific interference with the father's right to assure his daughter's medical care, restricting him from taking Ingrid to the doctor without the permission of the parent who the judge had found to be "irresponsible" with regard to medical matters, particularly where it concerned involvement of the father, was not only unjustified interference with a parental right to care for ("raise") one's child. The child's right and need to be responsibly cared for was ignored. The Appellate court's comment that yearly checkups would offset possible harm from lack of attention to illnesses and doctor care, is at odds with the frequency of illness and physical vulnerability characteristic of a child of Ingrid's age.

The child's need to have such care, instruction and ongoing emotional security in [her] two parents is not questioned when the child lives in the nuclear family setting. If those established parent/child bonds have fundamental status for parents, wed or unwed, who are adults and presumably have developed abilities to care for themselves, how much more essential are those rights for the child, whose need to rely on the continued care and affection from her parents is crucial to her development, and which she is helpless to defend or regain if the relationship with a parent is crippled by a court order.

Under the principles of fundamental family rights, children's rights to have the love and upbringing of their father and mother cannot be conditioned on the father and mother favoring each other. The parents "belong", in their parental role, not to each other but to the child. Otherwise, children are subject to suffering undue loss because when the relationships of other people fail, the state moves in and acts to deprive the child of her relationship with one of her parents.

If state action classifies individuals on the basis of a suspect category or burdens a fundamental interest, it is subject to strict judicial scrutiny. Graham v. Richardson (1971) 403 U.S. 365, 371-372, 375-376, 91 S.Ct. 1848, 29 L.Ed 2d 534; Trimble v. Gordon (1977) 430 U.S. 762, 766-767, 97 S.Ct. 1459, 52 L.Ed 2d 31. The California Legislature abolished the concept of "illegitimacy" in 1975 (Stats. 1975, Ch. 1244) and all other distinctions between children whose parents are married and those whose parents are not (Civil Code §§7000-7018). This is consistent with the United States Supreme Court in Trimble v. Gordon, supra, and Jimenez v. Weinberger 417 U.S. 628, 634-638, 41 L.Ed.2d 363, 94 S.Ct. 1204 (1974).

## CONCLUSION

It is proper under Federal and California law for an unwed father to seek State protection of his relationship with his child, if the unwed mother presumes to seize full custody, when the paternal

relationship has been established by exercising custody and care of the child, with an emotional bonding between the father and the child. This does not constitute a "campaign" to limit access of the mother, but a request for equal protection and due process, and in fact is a request that extends equal protection to the unwed mother as well. Where, as here, there is no substantial evidence of a compelling cause for interference with such a relationship, the order must be reversed, to maintain the standards for fundamental rights established by the United States Constitution.

For the foregoing reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the California Court.

Respectfully submitted,

Joseph C. Loesch
18363 Germain Street
Northridge, California 91324
In Propria Persona

## CERTIFICATE OF SERVICE

This is to certify that on the 31st day of August, 1987, a true and correct copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States was served on the counsel for Respondent, Ronald A Fiore, Esq., 16133 Ventura Boulevard, Suite 645, Encino, California 91436, by depositing copies thereof in the United States mail, Certified Return Receipt Requested.

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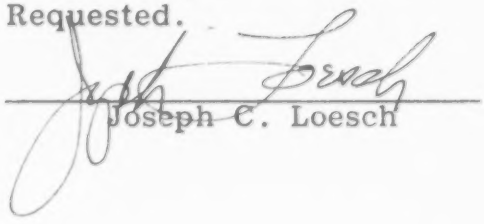
Joseph C. Loesch

## CERTIFICATE OF SERVICE

This is to certify that on the 6th day of October, 1987, a true copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States, corrected to include a Table of Authorities and Appendix, was served on the counsel for Respondent, Ronald A Fiore, Esq., 16133 Ventura Boulevard, Suite 645, Encino, California 91436, by depositing copies thereof in the United States mail, Certified Return Receipt Requested.



Joseph C. Loesch